Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

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Questions Presented

1. Does Section 312(a)(7) of the Federal Communications Act, interpreted in keeping with its legislative history and the First Amendment to the United States Constitution, provide an individual right of initial access to broadcast facilities to candidates for federal office?

2. Did the court below err in interpreting Section 312 (a)(7) of the Federal Communications Act so as to allow the FCC to intrude into the editorial process and to deny broadcasters discretion in crucial respects, by, *inter alia,* authorizing the Commission to determine when a federal election campaign begins and to assess "the needs of an individual candidate" for federal office?

3. Did the court below err in determining that a broadcaster had acted unreasonably in violation of Section 312 (a)(7) of the Federal Communications Act by declining to sell a half hour of broadcast time to a presidential candidate eleven months before the election and eight months before the nominating convention?

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Cases:

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Buckley v. *Valeo*, 424 U.S. 1 (1976) 20-21, 25
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Farmers Educational & Cooperative Union of America v. *WDAY, Inc.*, 360 U.S. 525 (1959) 28n, 35, 38, 39n
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Red Lion Broadcasting Co. v. *FCC*, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969) 29, 44
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United States v. *Vuitch*, 402 U.S. 62 (1971) 33n
United States Civil Service Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) 33n

Williams v. *Rhodes*, 393 U.S. 23 (1968) 20

Administrative Decisions and Reports:

Anthony R. Martin-Trigona, 66 F.C.C.2d 968 (Broadcast Bureau 1977), *reconsideration denied*, 67 F.C.C. 2d 43 (1978) 18n

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Barry Commoner, 48 R.R.2d 545 (FCC Broadcast Bureau 1980) 24n

Barry Commoner, Slip Op. (FCC Broadcast Bureau Oct. 30, 1980) 29n

Carter-Mondale Reelection Committee, Inc., 48 R.R.2d 414 (FCC 1980) 25n

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Ed Noble for U.S. Senate Committee, 79 F.C.C.2d 903 (Broadcast Bureau 1980) 24n, 26n

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Kennedy for President Committee, 76 F.C.C.2d 964, *aff'd*, No. 80-1482 (D.C. Cir. Aug. 6, 1980) 25n

Kennedy for President Committee, 80 F.C.C.2d 93 (Broadcast Bureau 1980) 24n

Loyola University, 12 R.R. 1017 (FCC 1956) 35

Obligation of Licensee to Carry Political Broadcasts, 25 R.R. 1731 (1963) 45n

Report and Statement of Policy Re: Commission En Banc Programing Inquiry, 44 F.C.C. 2303 (1960) 35, 42, 43n

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Rosenbush Advertising Agency, Inc., 31 F.C.C.2d 783 (1971) 36

State Senator William H. Hernstadt, 79 F.C.C.2d 944 (Broadcast Bureau 1980) 36n

WGN Continental Broadcasting Co., 58 F.C.C.2d 1142 (1976) 26n

W. Roy Smith, 18 F.C.C.2d 747 (Broadcast Bureau 1969) 36

Congressional Documents:

Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 41n, 43n, 44n, 46, 46n, 47n, 48n

Federal Election Campaign Act of 1971: Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 92d Cong., 1st Sess. (1971) 43n

Memorandum of Federal Communications Commission Concerning Interpretation of Second Sentence of Section 315(a), Communications Act of 1934, as Amended, Reprinted in Political Broadcasts—Equal Time, Hearings on H. J. Res. 247 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (1963) 36, 38, 39n

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S. 382, 92d Cong., 1st Sess. (1971) 41, 41n, 42, 43n

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S. Conf. Rep. No. 580, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1866 ..... 41n

S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773 .....40, 41n, 42, 44n, 46, 46n, 47n, 48n

S. Rep. No. 229, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1821 .....41n, 44n, 47n

Constitutional Provisions:

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47 U.S.C. § 315(a) (1976) 4, 5, 7, 28n, 29, 45n
47 U.S.C. § 315(b)(1) (1976) 19n, 46n

Judicial Code, 28 U.S.C. § 1254(1) (1976) 2

Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162 *reenacted as* Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064 ..... 45n

Other Authorities:

Albert, *The FCC Assumes a New Role as Regulator of Broadcast Advertising and Candidates Access*, 54 St. John's L. Rev. 279 (1980) 26n

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Brief of United States and FCC, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) 39n

Morrow, "Stop the Endless Campaign, Please," *Time*, Dec. 1, 1980 ..... 48n

Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169 (1978) 21n

1A Sutherland, *Statutory Construction* (4th ed. 1972) 44

L. Tribe, *American Constitutional Law* (1978) 21

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Reference to Administrative Rulings and Opinions Below

The Opinion of the Court of Appeals, per Bazelon, J., filed on March 14, 1980, and the separate concurring opinion of Judge Tamm are reported at 629 F.2d 1. The opinions are also reproduced in the joint appendix to the petitions for a writ of certiorari, commencing at page 1a.* The Memorandum Opinion and Order of the Federal Communications

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* The appendix required by Supreme Court Rule 21(k) to be submitted with the petitions for a writ of certiorari was submitted jointly by the petitioners American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS") and the National Broadcasting Company, Inc. ("NBC"), and is abbreviated herein as "Pet. JA." A joint appendix containing further material required by the Rules of this Court has also been submitted and is abbreviated herein as "JA."

Commission ("FCC" or "Commission"), adopted November 20, 1979 and released November 21, 1979, is reported at 74 F.C.C.2d 631 and is reproduced beginning at page 69a of the joint appendix to the petitions; the Memorandum Opinion and Order of the FCC on rehearing, adopted and released on November 28, 1979, is reported at 74 F.C.C.2d 657 and is reproduced beginning at page 110a of the joint appendix to the petitions.*

Jurisdictional Statement

The judgment of the Court of Appeals affirming the orders of the FCC was entered on March 14, 1980. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by the National Broadcasting Company, Inc. ("NBC") on April 18, 1980, the time to file such motion having been extended by the Court of Appeals. The motion for rehearing was denied on May 15, 1980 (Pet. JA 153a). NBC filed a petition for certiorari on August 13, 1980, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976). The petition was granted on November 3, 1980.**

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth at pages 155a-157a of the joint appendix to the petitions.

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* The parties participating in the proceedings below were: ABC, CBS, and NBC (as petitioners to the Court of Appeals); the FCC and the United States of America (as respondents in the Court of Appeals); and the National Association of Broadcasters and the Carter-Mondale Presidential Committee, Inc. (as intervenors in support of the petitioners and respondents, respectively).

** As required by Supreme Court Rule 28.1, NBC advises the Court that its parent company is the RCA Corporation ("RCA"). Neither NBC nor RCA has any corporate affiliates or subsidiaries other than wholly owned subsidiaries.

Statement of the Case

A. *The Committee's Request for Broadcast Time*

On October 11, 1979 Gerald M. Rafshoon, on behalf of the Carter-Mondale Presidential Committee (the "Committee"), wrote letters to the presidents of each of the three national television networks. In his letter to NBC President Fred Silverman (JA 37), Mr. Rafshoon stated that he was "requesting availabilities" for a half hour of network time between 8:00 p.m. and 10:30 p.m. on December 4, 5, 6 or 7, 1979.* The request to NBC recited, *inter alia*, that the Committee sought to purchase the time to broadcast a program

> "to be run in conjunction with an announcement concerning his candidacy by President Carter for [the] Democratic nomination for President, [which] consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program" (JA 37).

The letter referred to the fact that the Iowa Democratic Caucus, "the first official contest to select delegates to the Democratic National Convention," was scheduled to take place on January 21, 1980, "47 days after December 7, 1979, our last requested date for availabilities" (JA 37). The letter did not refer to any other primaries or delegate selection caucuses, but noted that the news media had focused attention on the Florida Caucus and Convention and "other aspects of the 1980 campaign" (JA 38).

NBC responded by letter of October 23, 1979 declining the request to purchase time (JA 42). In its letter NBC noted that it had carefully evaluated the request, but concluded that the earliness of the requested broadcast dates (eight

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* The letters sent by Mr. Rafshoon to each network president were essentially identical.

months before the Democratic National Convention and 11 months before the national election), the multiplicity of federal candidates at that stage of the campaign (12 announced candidates had held national elective office or been Governor of a state), and NBC's obligation under Section 315(a) of the Communications Act to provide equal half-hour time periods to all candidates requesting it should NBC honor the President's request, were all factors in its decision. NBC also noted that since the nomination process was focused at that time on political activities in individual states, such as the Iowa Caucus, the Committee might wish to contact individual local stations in those states.

The other television networks also declined to grant the time requested. CBS offered to sell the Committee two five-minute periods in the first week of December. This offer was refused. ABC offered to sell time in January. This too was refused.*

B. *The Complaint*

On October 29, 1979 the Committee filed a Complaint (JA 27) against each of the networks alleging a failure to comply with the "reasonable access" requirements of Section 312(a)(7). The Committee criticized as inadequate the explanation offered by NBC.

C. *NBC's Response*

On November 5, 1979 NBC filed a Response to the Complaint (JA 60). NBC noted the guidelines established by the FCC with respect to the application of Section 312(a)

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* As a result of the Iranian hostage crisis, the Carter-Mondale Committee amended its request, seeking to purchase from any one of the networks 5 minutes of broadcast time for December 4, 1979. CBS agreed to this request and the Committee broadcast a message on that date. When the Committee sought to purchase time in January, NBC offered to sell a 30-minute time period, as did ABC; the Committee declined NBC's offer and accepted that of ABC (629 F.2d at 9; Pet. JA 11a). All of the parties below, as well as the Court of Appeals, agreed that these circumstances did not moot the controversy with respect to the original request (629 F.2d at 27-28; Pet. JA 52a-54a).

(7) and specifically stated that it "has taken into consideration the factors specified by the Commission" (JA 64). The Response listed the particular factors which had led to the decision not to provide the requested time. NBC again pointed out that the request sought broadcast time nearly a year before the general election, eight months before the Democratic National Convention, and at a stage of the process when "the campaigns waged by the presidential candidates are on a state by state basis" (JA 67). It suggested that the needs of candidates with respect to such state events could be met by local stations. The Response also pointed out that the multiplicity of candidates meant that the equal time provisions of Section 315(a) of the Communications Act would require NBC to be prepared to make half-hour periods available to a significant number of applicants in a relatively short period of time (JA 68-69). NBC emphasized the particular strain this would pose during the month of December when it had scheduled a total of only seven half-hour program positions (as compared to programs of one or two hours in length) for the period subsequent to December 7, 1979 (the last date requested by the Committee). It noted that under these circumstances the potential disruption of its schedule would be unusually great. The Response urged that under all of these circumstances NBC's decision not to make the specific time requested available was reasonable.

D. *The Commission's Orders*

The Commission entered two orders in this case, each following a 4-3 vote. Each concluded that the networks had violated Section 312(a)(7). In a number of respects, however, the two orders differed from each other significantly.

1. The Commission's Initial Order

The initial 4-3 decision of the Commission produced five separate statements by the Commissioners. The majority opinion, in relevant part, concluded:

> (a) While the statutory language does not define the scope of the Commission's responsibilities or the

procedures to enforce them and the legislative history does little to clarify these responsibilities and procedures (74 F.C.C.2d at 637; Pet. JA 78a), the "factors which [the Commission] consider[s] relevant to a Section 312(a)(7) judgment are: the candidate's needs, the number of candidates, and the availability of classes of time" (74 F.C.C.2d at 642; Pet. JA 87a). It added, however, that "particular emphasis" was placed "on the candidate's needs" because it believed "Federal candidates are the intended beneficiaries of Section 312(a)(7)" (*id.*). The Order noted that the licensee was not free to substitute its judgment for the candidate's own assessment of his "needs," but that "the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against other factors which we have said are relevant" (74 F.C.C.2d at 642; Pet. JA 38a).

(b) NBC had failed to apply the appropriate standards in that

> "NBC has apparently given no consideration to the Committee's determination that 'the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States'; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date" (74 F.C.C.2d at 644; Pet. JA 91a).

(c) In this context, the reasons given by NBC supporting its decision were "insufficient" (*id.*), since "the 1980 presidential campaign has begun much earlier than previous campaigns and is already in full swing" (74 F.C.C.2d at 645; Pet. JA 92a); this activity was nationwide in scope and therefore the Commission "cannot find that NBC acted reasonably in concluding

that a national campaign has not yet begun" (74 F.C.C.2d at 647; Pet. JA 94a).*

(d) Although "'multiplicity of candidates' is an appropriate factor to consider in determining whether to grant access to a particular candidate" (74 F.C.C.2d at 647; Pet. JA 95a), and although NBC was reasonable in taking into account both Republican and Democratic candidates as potential claimants of equal time under Section 315(a) if the requested time were granted (74 F.C.C.2d at 647; Pet. JA 96a), only a small percentage of the potential candidates likely would qualify as candidates and/or have the financial resources to purchase equal time, and in light of the fact that only presidential and vice presidential campaigns were national in scope, the number of candidates would not render reasonable NBC's determination not to grant the requested time (74 F.C.C.2d at 647-48; Pet. JA 96a).

(e) The potential for programming disruption was not a sufficient justification for a decision not to provide access (74 F.C.C.2d at 648; Pet. JA 97a-98a).

(f) NBC's decision amounted to an "arbitrary, 'blanket' ban" which was unreasonable (74 F.C.C.2d at 649; Pet. JA 98a).

(g) Finally, NBC and the other networks were required to inform the FCC "as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979" (74 F.C.C.2d at 651; Pet. JA 101a).**

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* NBC had, in fact, stated no such conclusion; it merely concluded that it was reasonable to decline to sell time to the Committee so many months before both the Democratic National Convention and the election itself (JA 64-67).

** The Order also held that notwithstanding the limitation of § 312(a)(7) to the revocation of "any station license or construction permit" and the absence of any reference to networks, the statute applied as well to the latter (74 F.C.C.2d at 639-40; Pet. JA 81a-83a). Although we believe that this aspect of the Order was

(Footnote continued on following page)

The difficulties presented by the Commission's decision were emphasized by three of the members of the majority. Commissioner Quello acknowledged in a separate statement that the "complaint raises some very fundamental issues which I find particularly difficult to resolve" (74 F.C.C.2d at 654; Pet. JA 107a). He emphasized the "very subjective judgments" the FCC had been called upon to make (*id.*) and explicitly stated his opposition "on First Amendment grounds" to Section 312(a)(7) (74 F.C.C.2d at 655; Pet. JA 108a).* Commissioner Quello also noted that the case "demonstrates some very practical reasons why we shouldn't be deciding matters of tactical significance to candidates" (*id.*). Chairman Ferris and Commissioner Fogarty pointed out that the decision as to what "moment in time" the requirement of Section 312(a)(7) attached "is especially difficult" (74 F.C.C.2d at 651; Pet. JA 102a). They also warned that the FCC must guard against "permit[ting] its determination to be the decisive factor turning an incipient campaign into a full-fledged one." They stated their belief that they had "avoided that danger in this case" (74 F.C.C.2d at 652; Pet. JA 103a).

Commissioners Lee, Washburn, and Jones dissented (74 F.C.C.2d at 652-54; Pet. JA 103a-107a).

On the next business day after release of the Order, NBC sought reconsideration and a stay pending judicial review (JA 174, 181).

2. The Commission's Supplemental Order

On November 28, 1979, by the same 4-3 vote, the FCC denied the motion for reconsideration and declined to stay its Order. Its Memorandum Opinion and Order of that date (the "Supplemental Order") sought to clarify the

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erroneous, we limit ourselves in this brief to the substantive errors of the Commission and the court below relating to the meaning of § 312(a)(7), regardless of the entities to which it may apply.

* At the November 20 open hearing at which the Order was adopted, Commissioner Quello stated with respect to § 312(a)(7): "I question its constitutionality. I think it offends the First Amendment" (JA 140).

Commission's position on a number of issues raised in the request for reconsideration (74 F.C.C.2d at 657; Pet. JA 110a). The principal elements of the Supplemental Order are described below:

(a) The Supplemental Order altered somewhat the Commission's description of the "candidate's needs" factor in the evaluation process, disclaiming any intention to require "broadcasters to make an assessment of individual candidate 'needs' insofar as they solely relate to the candidate's subjective, personal, or immediate 'political' desires" (74 F.C.C.2d at 667; Pet. JA 127a). The broadcaster nevertheless was to include this consideration as a factor in the weighing process and to explain how its offer of time is "responsive to the specific purpose of the . . . particular request" (74 F.C.C.2d at 668; Pet. JA 128a). The Supplemental Order did not further explain how the "needs" factor is to be used in any evaluation process.

(b) In the Supplemental Order, the Commission, for the first time, indicated that it would not defer to a licensee's reasonable judgment as to whether, among other things, it was appropriate to begin providing "use" time to candidates in a particular campaign, but instead would itself make an independent determination of when a particular federal campaign began as a purely objective matter (74 F.C.C.2d at 665-66, 673 n.19; Pet. JA 124a, 136a n.21; see also the separate statement of Commissioner Brown, 74 F.C.C.2d at 678; Pet. JA 144a-145a).

(c) The Supplemental Order also stated that "generalized assertions about the number of potential multiple requests for time" would not be considered in evaluating a broadcaster's response to a request for time. Rather, the Supplemental Order required an assessment of "actual likelihood at each stage of a campaign" and stated:

"In this connection, we think it entirely appropriate that the broadcaster contact the candidates at

> the outset and at various stages during the campaign to determine the probability of access requests by such candidates" (74 F.C.C.2d at 667; Pet. JA 126a).

The Supplemental Order did not cite any previous authority for such interpretation or requirement.*

(d) It also indicated for the first time that special weight was to be accorded to the fact that a particular request was the candidate's first request in a particular campaign (74 F.C.C.2d at 667; Pet. JA 126a-127a). Indeed, Commissioner Brown, a necessary vote in creating the majority, stated that absent "compelling" reasons, a licensee would *always* be unreasonable if it did not honor a first request (74 F.C.C.2d at 679; Pet. JA 146a).

(e) The Supplemental Order rejected the contention that Section 312(a)(7) only codified existing Commission policy at the time of its enactment, stating that this Court's language to that effect in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 113-14 n.12 (1973), was not controlling since the question had not been before the Court and "the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it" (74 F.C.C.2d at 662; Pet. JA 118a-119a).**

(f) The Supplemental Order also reaffirmed the Commission's explicit refusal to consider the constitutionality of Section 312(a)(7) on the ground that "such issues are for the courts and Congress to resolve" (74 F.C.C.2d at 665; Pet. JA 123a).

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* In this connection, it should be noted that Commissioner Brown, a member of the 4-3 majority, was explicit in refusing to take account of even the 12 major presidential candidates in assessing the issue of reasonable access (JA 251-53).

** The Commission had, in fact, urged this Court to reach precisely the conclusion that it did. *See* p. 39 n.* *infra.*

(g) The Supplemental Order acknowledged that NBC did weigh a variety of factors "against the needs of the candidate" but found these factors "unpersuasive" (74 F.C.C.2d at 671; Pet. JA 133a). It held that "NBC merely asserts in conclusory terms [that] it has weighed all relevant factors; but it has totally failed to articulate how it reached its result" (*id.*; footnote omitted).

(h) The Supplemental Order restated the networks' obligation to inform the Commission of how they intended to comply with Section 312(a)(7) by the close of business, November 29, 1979, noting that the Commission would examine those responses to see if the networks' "conduct reflect[s] a further failure to meet obligations" and that it would then decide "what, if any, specific measures may be required to remedy any continued failure to comply with Section 312(a)(7)" (74 F.C.C.2d at 676-77; Pet. JA 142a).

Commissioners Lee, Washburn, and Jones again dissented. Commissioner Lee noted that the decision simply did not leave "broadcast discretion with the networks" as the majority asserted. "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted). Commissioner Lee also stated that the reasons offered by the networks "thoughtfully included consideration of the needs of candidates, the public, and the networks" (*id.* at n.1).

Commissioner Washburn stated that the majority decision improperly emphasized the "candidate's needs" standard and "substitute[d] the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto." The dissent characterized this "governmental intrusion" as "illegal" and predicted that it would "have far-reaching consequences

that will come back to haunt the Commission and the public again and again" (74 F.C.C.2d at 682; Pet. JA 151a).

E. *The Decision of the Court of Appeals*

NBC filed a petition for review in the Court of Appeals on November 29, 1979; it also sought a stay of the Commission's decision. A panel of that court granted the stay and ordered an expedited hearing.

On March 14, 1980 a second panel of the Court of Appeals entered judgment affirming the orders of the Commission. In an opinion written by Senior Judge Bazelon, the court concluded that notwithstanding the Commission's view that the statute's language did not expressly define the scope of the FCC's responsibilities and that the legislative history provided little or no guidance, the "plain meaning" of Section 312(a)(7), as well as its legislative history, conferred an individual right of access upon candidates seeking federal office, unconditioned upon any prior use by another candidate or upon campaign coverage by the broadcaster (629 F.2d at 11-13; Pet. JA 15a-20a). In so doing, the court declined to attach any weight to Congress' expressed goal of reducing the duration and expense of political campaigns, and dismissed as mere "dictum" the conclusion of this Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 113-14 n.12 (1973), that Section 312(a)(7), rather than imposing additional access obligations upon broadcasters, "essentially codified" the Commission's prior application of the general public interest standard under Section 315(a) (629 F.2d at 13; Pet. JA 21a).

Judge Bazelon's opinion proceeded to analyze and uphold as reasonable the Commission's implementation of Section 312(a)(7). It expressly affirmed the authority of the FCC to determine when a federal election campaign begins (629 F.2d at 16-17; Pet. JA 27a-29a) and endorsed the Commission's specification of the factors to be considered in evaluating access requests under Section 312(a)(7), including: "(a) the individual needs of the candidate (as

expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request" (629 F.2d at 19; Pet. JA 33a). The court concluded that the networks had failed to apply these criteria and had thus violated Section 312(a)(7) by resorting to an "across-the-board ban" on candidate access (629 F.2d at 19; Pet. JA 34a).* The court held that, rather than applying such uniform policies, the networks must accede to the Commission's mandate that, "in addressing a request for access from a candidate for federal office, the broadcaster ha[s] to tailor his response to the *individual* candidate" (629 F.2d at 22; Pet. JA 39a-40a; footnote omitted, emphasis in original).

While the Commission had declined to consider the constitutionality of Section 312(a)(7), the Court of Appeals found the provision to be constitutional as implemented by the FCC. Rejecting the arguments raised by the broadcasters, it found that the Commission's role in determining when a campaign has begun does not constitute an impermissible governmental involvement in the electoral process (629 F.2d at 16-17; Pet. JA 28a) and that the Commission's orders do not impinge on editorial discretion or inject government into the decisional processes of broadcasting (629 F.2d at 25; Pet. JA 46a-47a). Although recognizing that the actions of the FCC "in these cases were not flawless" and that "the agency failed to headline its policy as clearly as it might have" (629 F.2d at 23; Pet. JA 42a), the Court of Appeals held that the Commission had satisfied the

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* While holding that the approach taken by the networks was unreasonable, the court noted: "The [FCC's] decisions allow the broadcaster leeway to demonstrate . . . that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that the other candidates will request time. Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible" (629 F.2d at 20; Pet. JA 37a; footnote omitted, emphasis in original).

criteria for "reasoned decision-making" required of administrative decisions (*id.*).

Judge Tamm filed a separate concurrence. He expressed throughout his opinion a pointed concern that the Commission's decision raised the specter of improper, "non-neutral" intrusion by the government into the electoral process. His concurrence reflected as well his sense of unease flowing from the very real dangers to First Amendment rights associated with a system of mandatory access provided, not under equal time or other mechanical guidelines in response to the broadcaster's own programming choices, but rather as an individual "affirmative" right to initial access. These intrusions, Judge Tamm noted, were magnified by the fact that the broadcaster's decisions regarding the granting of initial access to individual candidates, including an incumbent President running for re-election, were to be scrutinized by a Commission whose members were themselves appointed by that President (629 F.2d at 32-33; Pet. JA 63a-64a). He ultimately concluded, however, that sufficient "safeguards" existed for "controlling the danger of non-neutrality" (629 F.2d at 34; Pet. JA 67a), and that in imposing what he viewed as a "flat ban" on the sale of time the networks had abused the broad discretion granted them (629 F.2d at 34; Pet. JA 68a).

Summary of Argument

In this brief we deal first with the impact of Section 312(a)(7) as it has been interpreted by the Commission. We demonstrate the nature of the threat to the neutrality of government *vis-a-vis* the electoral process occasioned by that interpretation, a threat which flows directly from the Commission's arrogation to itself of the power to determine, for example, when a campaign has begun or to require broadcasters to weigh and then itself to reweigh the "needs" of particular candidates as against other factors considered relevant in assessing requests for access.

The Commission's implementation of Section 312(a)(7) is shown to threaten as well the delicately balanced system

of broadcast regulation. That system is one in which the values inherent in the exercise of journalistic judgment by broadcasters have been recognized by Congress and the courts, and in which the common-carrier-like status imposed by the decisions below has been explicitly rejected. The decisions below ignore these critical elements of the overall system. They do so without the slightest effort to reconcile their approach with the established regulatory system or with the broadcaster's First Amendment right to exercise discretion as to its programming. And, in unprecedented fashion, they transform a statute requiring "*reasonable* access to . . . *reasonable* amounts of time" into one under which there is to be no meaningful deference to broadcaster decisions as to what access is, in fact, reasonable. Any interpretation of Section 312(a)(7) which departs so markedly from constitutionally rooted approaches to broadcast regulation, and which in so doing threatens non-neutral governmental involvement in the electoral process as well, should not be adopted in the absence of the most explicit of congressional directions.

No such direction is present here. On the contrary, as we demonstrate in Point II of this brief, the legislative history of Section 312(a)(7) and prior interpretations by the Commission and by this Court make clear that the draftsmen of the statute intended no radical departure from the Commission's prior approach which recognized, as part of the public interest standard, a requirement that a broadcaster generally devote broadcast time to political activities, including making time available for the use of political candidates generally. Section 312(a)(7) was intended to establish this principle as a matter of statutory law and to emphasize it by providing a separate and severe sanction for violation of what had been but one of 14 elements of a general public interest standard articulated by the Commission. Nothing in the history of the statute suggests an intent to create an individualized right of initial access. The determination of the Commission and the court below to the contrary is based on a fundamental failure to come to grips with the legislative history of the statute and with

the unacceptable consequences resulting from such a determination.

ARGUMENT

At the core of this case is the question of the meaning of a statute which, as the Commission itself acknowledged, "does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them" (74 F.C.C.2d at 637; Pet. JA 78a). In this case, turning as it does on the meaning of Section 312(a)(7) of the Communications Act, it is well to begin with the words of the statute itself. That section provides:

> "(a) The Commission may revoke any station license or construction permit—
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> • • •
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

From the statutory language itself one could divine none of the striking elements of the decisions below: not that the Commission was thereby authorized to depart from its preexisting approach to candidate access and to substitute in its place a common-carrier-like obligation inconsistent with half a century of broadcast regulation; not that the Commission would as part of that new approach determine when each federal campaign begins; not that the broadcasters—and the Commission as reviewing body—are to weigh the "individual needs" of candidates for federal office against other criteria; surely not that it would be deemed *per se* unreasonable to offer to sell two five-minute periods instead of one fifteen-minute period in a December eleven months before a national election (as the Court of Appeals suggested) or to offer a half hour in January instead of in December.

We offer the Court two routes to determine the proper scope of Section 312(a)(7). The first involves an examination of the consequences of the interpretation placed upon the statutory language by the Commission: intrusion by the Commission into the electoral process; risks of politically motivated decision-making by the Commission; a likelihood of infringement upon the First Amendment; and a reversal, in any event, of all prior approaches to broadcast regulation. All of these unintended results, we urge, flow directly from the interpretation placed upon Section 312(a)(7) by the Commission—an interpretation leading to consequences of such constitutional dubiety as virtually to compel the conclusion that Congress should not be said to have sought them. Second, we turn to the legislative history itself, which (a) lends significant support to our reading, and that previously set forth by this Court, as to the proper meaning of Section 312(a)(7), and (b) lends no support whatever to the interpretation placed upon the statute by the decision below.

I.

The Improper Governmental Intrusion into the Electoral Process and the Destruction of Broadcaster Discretion Inherent in the Commission's Approach Render Its Interpretation of Section 312(a)(7) Impermissible.

A. *The Commission Improperly Assumed a Major Role in Setting the Timing for the Presidential Election*

Under the Court of Appeals' decision, the Commission hereafter is to determine "objectively" when each political campaign for each federal nomination or election in the nation has begun. The origin of the Commission's expertise in this area or the source of the congressional delegation of such power is nowhere identified either by the Court of Appeals or by the Commission;* indeed, the Commission's role in this respect was not even articulated until its Supple-

* Congress is given the power to regulate congressional elections under Article I, Sections 4 and 5 of the Constitution; its powers with respect to setting the time of presidential elections are set forth in Article II, Section 1, Clause 3.

mental Order.* In an area as sensitive as governmental regulation affecting the electoral process, one may legitimately expect an express grant of regulatory power from Congress; in its absence, so broad and sweeping a construction of the FCC's authority is clearly suspect.

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* The Commission's Initial Order seemingly applied a general "reasonableness" standard in evaluating the broadcaster's judgment that the timing of the requested broadcast relative to the overall nomination and election process was one among several factors that made a particular request for time inappropriate (74 F.C.C. 2d at 643-44, 646-47; Pet. JA 89a-90a, 94a). This was in keeping with Commission precedent, which had recognized that there was no single date upon which a campaign "began" so as to bring into play § 312(a)(7). Rather, each licensee was free to make a reasonable judgment as to when it would begin offering "use" time to candidates with respect to various campaigns. Thus, the Commission's Broadcast Bureau had earlier stated, in a decision unchallenged by the Commission until the Supplemental Order, that an assessment of when a campaign was sufficiently underway as to warrant the provision of access was confided to broadcaster discretion. In *Anthony R. Martin-Trigona,* 66 F.C.C.2d 968 (Broadcast Bureau 1977), *reconsideration denied,* 67 F.C.C.2d 743 (1978), the Bureau concluded:

> "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." 66 F.C.C.2d at 969.

Similarly, in dismissing the appeal of the senatorial candidate in that case, the Commission itself stated in the most general terms possible that "a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes. . . ." 67 F.C.C.2d at 746.

Adherence to this approach would have avoided some of the most obtrusive aspects of the Commission's new role. It would have resulted in a variety of differing, but reasonable, judgments by individual broadcasters as to when "use" time should be provided —a far healthier result for the political and broadcast systems than a centralized determination by the FCC as to when each federal election campaign begins.

Furthermore, for the Commission to have found NBC's conduct to be unreasonable for failing to adhere to standards first announced in its Supplemental Order says much about the nature of the Commission's approach in deciding this case. The Court of Appeals dismissed the rulings in *Martin-Trigona* as "dictum" (629 F.2d at 16 n.59; Pet. JA 26a n.59), and nowhere dealt with the fact that the Commission's Initial Order characterized the question of timing as one of reasonable licensee discretion.

The Court of Appeals viewed the FCC as an objective observer whose determinations are removed from and have no effect upon the electoral process; that is surely a view as unworldly as it is unlikely to have been held by Congress. The court itself recognized the significant role played by television in electoral campaigns, stating that "it would be hard to overestimate the importance of television to our political processes" (629 F.2d at 10; Pet. JA 12a). A finding by the Commission that statutory obligations to provide initial access have attached would, in a very real sense, represent the firing of the starter's gun. Once any candidate is authorized by the government to begin his television campaign, opponents hang back at their peril. A decision by the Commission in this regard surely has a momentum and an impact of its own.

In support of its conclusion, the Court of Appeals stated that "[a] determination of when statutory obligations attach is not an editorial decision" but instead "is purely a legal judgment," which the Commission was legally permitted to make on its own, without the slightest deference to the views of broadcasters (629 F.2d at 17; Pet. JA 28a). This view (flatly contrary to that previously taken by the Commission) begs the essential question of whether Congress intended the FCC to become involved in such politically charged decision-making—decision-making which involved in this case presidential appointees determining, on the basis of a 4-3 vote along strict party lines, whether time must be sold to the President himself.

Nor does anything in Section 312(a)(7) suggest an intent to confide such power to the FCC.* When Congress

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* The approach adopted below expressly declined to make any use whatsoever of time frames established elsewhere in the very legislation of which § 312(a)(7) is a part. The Commission was explicit in this respect, declining to read § 312(a)(7) "in conjunction with Section 315(b)(1)" (74 F.C.C.2d at 638; Pet. JA 79a-80a). The latter section, passed at the same time, established periods of 60 days before a general election and 45 days before a primary election during which a licensee would be prohibited from

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has intended federal agencies to play an active regulatory role in the electoral process, it has been conscious of the delicacy of that role and sought to insulate the agency from the political process;* no such effort was made in connection with Section 312(a)(7). The decision of the Commission majority, affirmed by the court below, that the FCC is to determine "objectively" when the campaign begins places the Commission in a position it was never intended to occupy.

The electoral process, of course, is fundamental to our representative democracy. Government regulation designed to ensure the integrity of that process has been sustained (*see Burroughs* v. *United States*, 290 U.S. 534 (1934); *Jenness* v. *Fortson*, 403 U.S. 431 (1971)), but only when the effect of that regulation does not infringe upon the "neutral" and "open" process of selecting those who make and enforce the laws. *See Bullock* v. *Carter*, 405 U.S. 134 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Indeed, the concern that government intrusion into the political process may impermissibly favor particular candidacies or induce public suspicion about the impartiality of a government regulatory scheme animated much of this Court's discussion in *Buckley* v.

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selling broadcast time to candidates at more than its lowest unit rates. The Commission concluded that in separating the two provisions Congress intended the 45- and 60-day periods not to define the time limits for "reasonable access" under § 312(a)(7). This is debatable in itself; it is all the more striking in light of the Commission's choice instead to decide for itself when election campaigns have begun. When Congress did intend that government become involved in the electoral process it chose clear and objective standards; the Commission opted instead to plunge into the electoral thicket itself.

* The otherwise limited nature of the Commission's involvement in electoral regulation generally may help to explain its adoption of an approach to § 312(a)(7) which directly frustrates two principal goals of the Federal Election Campaign Act of 1971 (of which § 312(a)(7) was a part)—namely, the shortening of campaigns and the reduction of their cost. These purposes are considered in Part II, *infra*, in an analysis of the legislative history of the Act.

Valeo, 424 U.S. 1 (1976). *See also* L. Tribe, *American Constitutional Law* 774 (1978).

The dangerously incestuous relationship between a government agency and the electoral process authorized by the decision below should not be sanctioned—most certainly not in the absence of the most explicit congressional direction.

B. *The Principal Criterion Relied Upon by the Commission—the Individual Candidate's "Needs"—Is Either Unconstitutional or Meaningless*

Under the ruling below, the Commission is, as well, to sit in judgment on whether the broadcasters have been sufficiently responsive to each candidate's statement of his needs for the time sought. It was in response to these holdings that Judge Tamm observed:

> "[U]nlike the regulatory approaches upheld in *Red Lion*, section 312(a)(7) deals solely with candidates for federal political office; in evaluating the danger of government nonneutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests. . . . As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners" (629 F.2d at 32-33; Pet. JA 63a-64a).*

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* *See* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 184 (1978):

> "In the past twenty-five years . . . every President, except President Ford, has had the opportunity to place his stamp on

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Judge Tamm's own conclusion was that these difficulties, threatening as they obviously are, could be surmounted if, "both at the broadcaster level and before the Commission on review, analysis of the 'individual needs' factor . . . focus[es] solely on the candidate's needs *as stated by the candidate* . . . ." (629 F.2d at 34; Pet. JA 67a-68a; emphasis in original). Yet, if the networks and, more importantly, the Commission are not to assess or weigh each candidate's needs, the "needs" criterion would seem to be meaningless: any candidate who requests time obviously believes he "needs" it. How then are these "needs" to be a factor in any evaluative process if some entity other than the candidate is not to assess the legitimacy of those needs? And if the networks—and, more significantly, the Commission itself—*are* required to engage in some kind of political weighing process (*see* 74 F.C.C.2d at 642; Pet. JA 87a-88a), what becomes of the neutrality properly viewed as essential by Judge Tamm? The Commission established, as a crucial criterion in determining whether or not "reasonable access" has been afforded, a concept which either

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the agency within his initial term of office. In addition to selecting the Chairman, these Presidents—often aided by vacancies created by members leaving before the expiration of a full term—have been able within a single term to appoint at least three members of the Commission. In their five-year terms, Presidents Johnson and Nixon appointed six and seven FCC members, respectively" (footnote omitted).

Judge Tamm also noted:

"[T]he Commission has, on occasion, been subjected to direct political pressure. In a 1970 memorandum describing administration efforts to achieve more favorable press coverage by the three major television networks, Charles Colson, Special Counsel to then President Richard M. Nixon, indicated that, 'as soon as we have a majority' he would pursue with Dean Burch, the newly-appointed Commission Chairman, a Commission ruling that would have 'an inhibiting impact on the networks.' . . . In a taped conversation in 1972, President Nixon himself threatened to use the Commission to retaliate against *The Washington Post* for unfavorable coverage: 'The main, main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it renewed' " (629 F.2d at 33 n.16; Pet. JA 64a-65a n.16).

has no meaning or dangerously involves the FCC in the political process.

What weight, for example, is a broadcaster to assign to a candidate's declaration that he needs 30 minutes to discuss foreign affairs, or tax issues, or charges of political corruption? Can a broadcaster—or the Commission—distinguish among these situations with the constitutionally required neutrality? The Commission expects broadcasters to justify the adequacy of their response to a request for access in terms of meeting the candidate's needs. CBS, for example, was faulted for making "no effort to explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request. CBS provided no explanation as to how two such short segments could afford enough time for a discussion of subjects as broad as those the candidate intends to discuss" (74 F.C.C.2d at 668; Pet. JA 128a-129a). How is such an explanation to be proffered without assessing the validity of the candidate's claimed need for the time? And if the requirement of neutrality bars such analysis, what is the broadcaster to assess? Neither the Commission nor the Court of Appeals answered these questions.

In this case President Carter stated his desire to commence his campaign with a half-hour broadcast; presumably he best knew his needs. A lesser known candidate might as reasonably have requested—and "needed"— two hours. Congressman Crane began his presidential campaign more than two years before the 1980 election; Vice President-elect Bush began his campaign 18 months before the election. Presumably, these early starts reflected realistic, or in any event incontestable, assessments of their needs. How is a broadcaster to "evaluate" such a candidate's view of his own "needs"? What of the even greater needs for exposure of minor-party candidates?

The Commission and the court also rejected any effort by the broadcaster to establish uniform, neutral approaches applicable to all candidates for federal office, insisting instead on an "individualized" approach tailored to each

candidate, with the Commission sitting in review.* Unlike the equal time provisions, no objective, mechanical criteria exist under the Commission's approach as approved by the court below;** instead each broadcaster is to evaluate each

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* This refusal to accept any uniform, neutral approach has been reinforced in subsequent decisions of the Commission. *See, e.g., Kennedy for President Committee,* 80 F.C.C.2d 93, 98-100 (Broadcast Bureau 1980); *Ed Noble for U.S. Senate Committee,* 79 F.C.C.2d 903, 908 & n. 7 (Broadcast Bureau 1980). In *Ed Clark for President Committee,* 48 R.R.2d 433 (FCC Broadcast Bureau 1980), while rejecting a complaint that NBC failed to offer a candidate a sufficient number of 5-minute programs in prime time, the Commission's Broadcast Bureau stressed once again:

> "The Commission Policy Statement On Section 312(a)(7), the Carter-Mondale decisions, and later Commission interpretations of those decisions [citing *Kennedy* and *Ed Noble, supra*] have emphasized the importance of consideration by the broadcaster of a candidate's individual needs. This special consideration can be attributed to the Commission's belief that 'Federal candidates are the intended beneficiaries of Section 312(a)(7).'" 48 R.R.2d at 437 (footnote omitted).

The Bureau again rejected any attempt by broadcasters to formulate and apply a uniform, even-handed approach:

> "Under the Carter-Mondale principles, we do not think it is permissible for a network to set aside a specific number of program times of a particular length and divide those times among the potential requestors. Such a practice would appear to contradict the requirement for a broadcaster to consider each candidate's individual needs on a request-by-request basis." *Id.* at 438.

Only a few weeks later, however, in holding that ABC had violated § 312(a)(7) by requiring 17 days' advance notice for the clearance of advertisements on its radio network, the Bureau stated: "One remedy [for the technical problems of last-minute clearance] would have been for the network to set aside a certain number of spots for sale to political candidates and obtain clearance in advance from the affiliates." *Barry Commoner,* 48 R.R.2d 545, 550 (FCC Broadcast Bureau, 1980). The Bureau failed to explain how this approach would allow the network to accommodate a candidate's "individual needs," or how it could be reconciled with the Bureau's previous statements in *Ed Clark,* quoted above.

** The Commission itself has recognized in other decisions the dangers of departing from such objective standards and has expressed its reluctance to involve itself in questions that require the Commission to make difficult policy judgments in the electoral field. Thus, in *Paulsen* v. *FCC,* 491 F.2d 887, 890 (9th Cir. 1974), in rejecting the claim of a presidential candidate that his television

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request in light of each candidate's needs, the number of prior requests, and the multiplicity of candidates who will seek equal time; this judgment is then to be subject to Commission review.*

It is difficult to imagine a less attractive or more dangerous area for the Commission to enter than this. Inevitably, as Chairman Ferris conceded during the initial hearing in this matter, access decisions—by government—would involve a "value judgment" about a candidate and his campaign (JA 157) and would require consideration of campaign strategies (JA 137-38). This is precisely the intrusive role that government may not play in the political process. *See Buckley* v. *Valeo, supra.* The Commission's rejection of any general rules applicable to all candidates in favor of individualized treatment of a candidate's specific request maximizes the intrusiveness of the Commission's action.**

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appearances as a professional entertainer should not give rise to equal time obligations under § 315, the court acknowledged the wisdom of the Commission's position that

> "it must apply [a] strict rule regarding the application of § 315 in order to avoid the unauthorized enlargement of involvement in broadcast operations. Paulsen's proposed distinction between political and non-political use would, the FCC contends, require it to make highly subjective judgments concerning the content, context, and potential political impact of a candidate's appearance. We agree."

The Commission has reaffirmed this position even after its decisions in this case. *See Carter-Mondale Reelection Committee, Inc.*, 48 R.R.2d 414, 421-22 (FCC 1980); *Kennedy for President Committee*, 76 F.C.C.2d 964, 968 (1980), *aff'd sub nom. Kennedy for President Committee* v. *FCC*, No. 80-1482 (D.C. Cir. Aug. 6, 1980).

* The Court of Appeals has subsequently noted the sharp contrast between the inquiry made by the FCC under the exemption of "bona fide newscasts" from the equal time obligations of § 315, where the Commission focuses "only on the nature of the event and the reasonableness of the broadcaster's treating it as a bona fide newscast," and the inquiry it has permitted the FCC to make under § 312(a)(7), where the focus is "the individual circumstances of the requesting candidate." *Kennedy for President Committee* v. *FCC*, No. 80-1482, Slip op. at 17 n.61 (D.C. Cir. Aug. 6, 1980).

** Under the Commission's approach, for example, any effort to make available uniform program lengths or time periods to all

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As this Court recognized in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94 (1973), in refusing to find that a system of access for editorial advertisements was constitutionally required:

> "Under a . . . Government supervised right-of-access system . . . , the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.
>
> ". . . The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when." *Id.* at 126-27.

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candidates for a particular office would necessarily be held unacceptable for failure to defer to each candidate's individual "needs," which must be weighed by the broadcaster—and ultimately by the Commission—against any other relevant factors with respect to each particular request. The administrative nightmare created by the hundreds of such decisions to be made during each election season by individual broadcasters and, in many cases, reviewed by the Commission on a highly expedited basis, only adds to the unacceptability of this governmental intrusion into the electoral process.

Moreover, the Commission has failed to apply uniform standards of its own in such decision-making. The inconsistencies over time in the Commission's interpretations of § 312(a)(7) can easily be traced in its decisions. *Compare Hon. Donald W. Riegle,* 59 F.C.C.2d 1314 (1976) (upholding licensee's rejection of candidate's 5-minute program and offer of 30-minute program and spot announcements instead, despite candidate's asserted "need" for program-length time and financial inability to purchase a 30-minute slot), *with Ed Noble for U.S. Senate Committee,* 79 F.C.C.2d 903 (Broadcast Bureau 1980) (holding licensee in violation of § 312(a)(7) for rejection of candidate's 5-minute program and offer of 30-minute program and spot announcements instead), *and WGN Continental Broadcasting Co.,* 58 F.C.C.2d 1142 (1976) (holding licensee in violation of § 312(a)(7) for refusal to sell spot announcements while offering 5-minute or longer programs instead). For a lengthy review of the Commission's fitful and inconsistent applications of § 312(a)(7), see Albert, *The FCC Assumes a New Role as Regulator of Broadcast Advertising and Candidates' Access,* 54 St. John's L. Rev. 279 (1980).

In times past, the FCC itself has well understood the risks involved in making such judgments and has declined to follow that path. For example, in *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974), in upholding under Section 312(a)(7) a broadcaster's decision not to sell to a candidate a five-hour block of late-night time, the Commission stated:

> "[W]ere we to call upon licensees to justify their programming selections or program scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when—a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." *Id.* at 849.

These concerns were ignored by the Commission and the Court of Appeals here.

Other criteria applied by the Commission aggravate rather than alleviate the risks of intrusion. Thus, in rejecting the broadcasters' reliance on the existence of a multiplicity of candidates and the potential equal time obligations that would arise from the granting of one candidate's request under Section 312(a)(7), the Commission required a showing that specific requests for equal time were likely to be made. It expressed its expectation that broadcasters would "contact the candidates at the outset and at various stages during the campaign to determine the probability of access requests by such candidates" (74 F.C.C. 2d at 667; Pet. JA 126a). Apart from its administrative impracticality, this approach forces broadcasters into what is, at best, the uneasy position of investigating the tactical and financial positions of candidates at government behest. Presumably, it also assumes that candidates will respond to such inquiries with a degree of openness and clarity that they might not generally provide to a journalistic organization, lest they forfeit a later demand for access. If anything, only the most compellingly clear legislative expression could justify such consequences.

C. *The Commission's Interpretation of Section 312(a)(7) Undoes the Delicately Balanced System of Broadcast Regulation*

The decision below not only improperly places the Commission at the heart of the electoral process; it does so in a fashion which maximizes the disruption of the broadcast system and the "delicately balanced" system of regulation to which this Court has referred. *See CBS* v. *DNC, supra,* 412 U.S. at 102. Such a result, raising constitutional issues of the largest and most threatening dimensions, can hardly be attributed to the Congress that adopted Section 312(a)(7).

As interpreted by the Commission and the Court of Appeals, Section 312(a)(7) would impose the single most far-reaching and intrusive restrictions on broadcaster editorial judgment ever sanctioned by the federal government in the name of "access." As interpreted below, the statute requires a broadcaster to make time available to candidates for federal office in units of time demanded by the candidate and within a narrow range of dates specified by the candidate. The obligation attaches regardless of the nature or the extent of coverage otherwise given by the broadcaster to the election campaign at issue. And the specific program which *must* be broadcast is selected by the candidate alone, one which the broadcaster may not edit or exercise editorial supervision over in any way.*

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* *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Commission has been vigilant in cautioning broadcasters that they have no authority to exercise any editorial judgment over political "uses" under the "non-censorship" provision of § 315(a). For example, when Barry Commoner, a candidate for the Presidency, submitted to the NBC Radio Network a 60-second radio spot which used a barnyard epithet at the outset to engage the attention of listeners, and the NBC Network advised its independently owned affiliated stations that although the commercial could not be censored by NBC it contained language that "some may find offensive," a complaint was filed against NBC by Commoner. Although NBC prevailed (on the ground that it did accept and distribute the advertisement,

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Significantly, the Commission's requirement that access be given to specific candidates in accordance with their self-defined needs is *not* one which, like the personal attack doctrine dealt with in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), or the equal time requirements of Section 315(a), is triggered by other programming which the broadcaster has chosen to present; nor is it, like the Commission's general public interest standard, an obligation which may be met in a variety of fashions within the reasonable judgment of the broadcaster.* *See Humphrey*

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after review by counsel, on the same day it was submitted), the Commission's Broadcast Bureau sternly admonished NBC that the initial negative reaction of its staff to broadcasting the announcement had been "clearly in error," that the language of its advisory to affiliates had been "unfortunate" and that, if "censorship by the affiliates [in fact occurred], NBC may have been derelict in its obligations under Section 315 to Commoner." *Barry Commoner*, Slip op. at 5-6 (FCC Broadcast Bureau, Oct. 30, 1980).

* The refusal by the Commission and the Court of Appeals to afford any deference to the reasonable judgment of broadcasters is one of the most striking and consistent features of the rulings below. One illustration of the Commission's approach is Commissioner Quello's statement: "I think maybe [the networks] had good reason for opposing [the request] but . . . I disagree with the conclusions of the networks . . ." (JA 140). Another is the previously discussed abandonment by the Commission (in contrast to its own prior holdings) of any deference to a licensee's decision as to when it would begin to offer "use" time to candidates in a particular election. Similarly, in weighing the factor regarding the "multiplicity of candidates," the Commission relied totally on its own unsupported assessment of the likelihood that other candidates would seek equal time in response to the Committee's proposed broadcast.

It remains difficult to fathom why the decisions of NBC (and ABC) to offer a half hour in January rather than December, or the decision of CBS to offer two 5-minute periods rather than a half hour in December, were so clearly improper as to be held unreasonable in a system purportedly based on deference to broadcaster discretion. Indeed, the Court of Appeals itself recognized that an offer of 15 minutes in December might well have been "defensible" (629 F.2d at 20; Pet. JA 37a). Despite the lip-service paid to the concept of broadcaster discretion, it is quite clear, as the dissenting Commissioners suggest, that the Commission's abandonment of certain criteria applied by it in the past, and its redefinition of

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for President Campaign, 34 F.C.C.2d 471 (1972). As Judge Tamm recognized in his concurrence, the Commission's policy "is designed not to achieve a balanced presentation of ideas, but rather to grant air time to particular speakers for initial presentations of their views" (629 F.2d at 32; Pet. JA 62a).

No such access requirement has yet been recognized by this Court. Indeed, in both *CBS* v. *DNC* and the Court's more recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), the Court expressed the gravest concerns as to the constitutionality of such requirements. In *CBS* v. *DNC*, the Court rejected the argument that a compulsory right of access for editorial advertisements was constitutionally compelled. While it did so without determining whether such a system would violate the First Amendment, this Court manifested its concern that the Commission would intrude too far into broadcaster discretion in attempting to enforce even a limited system of access. It thus observed:

> "By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast discussion of public issues. . . .
>
> "Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular indivi-

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others, eviscerated any real broadcaster discretion. As Commissioner Lee stated in dissent:

> "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted).

dual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of." 412 U.S. at 126-27 (footnote omitted).

Again, in *Midwest Video,* the Court manifested its concern with mandatory access requirements, invalidating the Commission's access rules for cable television systems. In the absence of the clearest congressional authority for the Commission's departure from the legislative policy against imposing common-carrier obligations upon broadcasters reflected in Section 3(h) of the Communications Act (47 U.S.C. § 153(h)), the Court held that the FCC may not impose mandatory initial access requirements. The Court stated:

"[W]e are unable to ignore Congress' stern disapproval —evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

". . . In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded [the] limits [of its authority] in promulgating its access rules. . . . We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress." 440 U.S. at 708-09 (footnotes omitted).

In both *CBS* v. *DNC* and *Midwest Video,* the Court noted the distinct risks of governmental as opposed to journal-

istic decision-making as to what should be broadcast.* Indeed, so sensitive is the balance thus far struck between the private journalistic discretion of broadcasters and their public obligations that even minimal additions to the obligations imposed by the fairness doctrine—a doctrine involving far less direct interference with broadcaster decisions as to the content and timing of broadcasts than the requirements at issue here—have been recognized as sufficient to threaten the whole. *See CBS* v. *DNC, supra. See also Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288, 296-97 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 934 (1976). In *Accuracy in Media,* the Court of Appeals itself declined to interpret the Public Broadcasting Act in a fashion which would "threaten to upset the constitutional balance struck in *CBS*" in the absence of a clear legislative intent compelling such a reading of the Act. Here, the Commission's interpretation would have precisely that effect, compelling broadcasters to air particular programs at governmental direction and then to incur specific additional programming obligations under the equal time requirements of Section 315. Such an interpretation would tilt the carefully achieved—and constitutionally required—balance of broadcast regulation by stripping the broadcaster of editorial control over significant amounts of broadcast time. Such a result is, at the very least, of the most dubious constitutionality. It surely may not be "presumed" to have been Congress' intent in the absence of far clearer evidence,

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* The price of deference to broadcaster discretion is, of course, the relegation to private judgment of decisions that do have a significant impact on matters of grave importance. The alternative, however, is government decision-making as to who shall be heard and when. Neither approach is without problems but, as this Court observed:

> "Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." *CBS* v. *DNC,* 412 U.S. at 105.

This case illustrates well the wisdom of that conclusion.

let alone where, as here, the legislative history demonstrates that Congress intended no such result (*see* Point II *infra*).

* * *

We do not, of course, suggest that providing the public with full information about presidential and other federal elections is anything but a vital goal; but there is no contention here, nor could there be, that at the time of his request Mr. Carter had not received enormous amounts of coverage on the NBC Network—both as President and as a soon-to-be-announced candidate for reelection—or that he would not receive even more such coverage in the future. By the same token, there is no contention that NBC has not honored equal time obligations when they have come into play. Nor is there any contention that NBC has not, in past elections (including that just past), sold substantial blocks of time to presidential candidates well in advance of the conventions and primaries. The Commission and the Court of Appeals have nonetheless interpreted Section 312(a)(7) in such a way as to thrust the Commission into the electoral process itself, threaten protected constitutional rights, and deviate from long established principles of broadcast regulation. All these consequences could and should have been avoided by a far different interpretation of the statute than that proffered by the Commission and sanctioned by the Court of Appeals. Such an interpretation would avoid the grave constitutional problems occasioned by the Commission's statutory reading.* And, as we next show, it would faithfully reflect the intention of Congress itself, as the decision below does not.

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* Fundamental to this Court's exercise of its power of review is the principle that it will endeavor to construe a challenged statute narrowly in order fairly to avoid a serious constitutional issue. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973); *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-72 (1947).

II.

The Decision Below Is Contrary to the Legislative History of Section 312(a)(7) and the Intent of Congress.

A. *The Law Prior to the Enactment of Section 312(a)(7) Provided No Individual Right of Initial Access to Specific Candidates*

From the earliest days of federal regulation of broadcast communications, the question of providing access to the airways for those who wished to speak about public issues generally and for political candidates specifically has generated much discussion. In 1973, this Court canvassed the history of that debate in its decision in *CBS* v. *DNC, supra,* 412 U.S. at 103-14. What emerged from that history was a consistent rejection by Congress of every effort to create any right to initial access in any particular group or individual for political or other purposes.

Thus, as this Court noted, Congress expressly rejected a 1926 proposal that would have rendered a broadcast station a "common carrier" with respect to use "by a candidate or candidates for any public office, or for the discussion of any question affecting the public." 67 Cong. Rec. 12503 (1926). In enacting the forerunner of Section 3(h) of the Communications Act, Congress firmly rejected the idea of broadcasters as common carriers. *See also Midwest Video, supra,* 440 U.S. at 708. As this Court emphasized in *CBS* v. *DNC,* "Congress intended to permit private broadcasting to develop with the widest possible journalistic freedom consistent with its public obligations." 412 U.S. at 110.

Over the years, the Commission and Congress have sought to advance the public interest by a variety of statutory and regulatory provisions in the area of elections and political issues. Thus, Section 315(a) of the Communications Act has long required that when a broadcaster provides time to one candidate for a particular political office, "equal time"

must be offered to all of that candidate's opponents. Similarly, an individual who is personally attacked on a broadcast is entitled to reply time. These opportunities are, of course, responsive in nature, directed to serving the interests of balance and fairness.

In addition to these specific doctrines, the FCC through the years developed a more generalized concept of the public interest. The Court recognized as early as 1959 that "the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings and in comparative contests for a radio or television construction permit." *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959) (footnote omitted). In 1960, the Commission again noted the significance of such broadcasts, identifying fourteen "major elements usually necessary to meet the public interest, needs and desires of the community," one of which was "political broadcasts." *Report and Statement of Policy Re: Commission En Banc Programing Inquiry*, 44 F.C.C. 2303, 2314 (1960).

Failure to provide such kinds of programming could be an important consideration in license application or renewal controversies, although superior performance in some of the fourteen areas might be viewed by the Commission as balancing out deficiencies in other areas, including political coverage. *See, e.g., Loyola University*, 12 R.R. 1017, 1099 (FCC 1956).

Neither the courts nor the Commission have ever understood the FCC's policy with respect to this public interest requirement as granting a right of initial access to any particular candidate. Instead:

> "While a licensee has an obligation to carry other legally qualified candidates for office if he presents one candidate for the office, he has no such obligation with respect to that first candidate; on the contrary, he can use his judgment as to whether there is an interest in affording time to this particular campaign as against

other political contests, and as to any other programing considerations that may be pertinent. . . .

• • •

". . . In short, the licensee's role in the area of political broadcasts is essentially the same as in the other programing areas—to make good faith judgments as to how to meet his community's needs and interests." *Memorandum of Federal Communications Commission Concerning Interpretation of Second Sentence of Section 315(a), Communications Act of 1934, as Amended, reprinted in Political Broadcasts—Equal Time, Hearings on H.J. Res. 247 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 1st Sess. 85, 90 (1963).*

See also Humphrey for President Campaign, 34 F.C.C.2d 471, 472 (1972); *Rosenbush Advertising Agency, Inc.,* 31 F.C.C.2d 783 (1971); *W. Roy Smith,* 18 F.C.C.2d 747 (1969); *J. B. Lahan,* 40 F.C.C. 342 (1962).

This was the law at the time Section 312(a)(7) was enacted. That existing body of law established no right of

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* The Commission continues to apply the same standard to coverage of state and local elections:

"[C]andidates in state and local elections have no initial right of access to broadcast stations and individual stations have the responsibility and discretion to determine which state and/or local elections are of sufficient interest and importance to cover, and to choose the method by which to cover them . . . . A licensee's discretion in providing coverage to elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign/election coverage will commence. A licensee's failure to establish its policy towards the type of coverage which will be afforded to an election which is still five months in the future, or a decision not to accept political advertising until two and one half months before the election, cannot be said to be an unreasonable refusal to devote adequate coverage to a significant and important election." *Hon. Dan Walker,* 57 F.C.C. 2d 799, 800-01 (Broadcast Bureau 1975).

For a recent reaffirmation of this principle, see *State Senator William H. Hernstadt,* 79 F.C.C.2d 944, 947-48 (Broadcast Bureau 1980).

initial access in any specific candidate, but left to the reasonable discretion of the broadcaster how it would cover elections—subject to the clear understanding that it was expected to devote broadcast time to political campaigns under the public interest standard and, of course, to comply with the fairness doctrine, the equal time rules, and other regulations of the Commission. The question thus arises: Was the enactment of Section 312(a)(7) intended to create the individual right to initial access in particular candidates which prior Commission policy had not? We think the answer is clearly no.

B. *This Court Has Previously Interpreted Section 312(a)(7) in a Fashion Directly Contrary to the Interpretation Adopted Below*

This Court has already answered precisely that question in just that way. In *CBS* v. *DNC*, in the course of deciding that neither the Constitution nor the Communications Act required the grant of access to potential political advertisers, this Court, as noted above, reviewed the history of broadcast regulation by Congress and the Commission to determine whether rights of initial access were granted under any provision. It noted that the basic principle underlying the fairness doctrine—crucial to the overall system of broadcast regulation—was "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949). The Court then noted that "[c]onsistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities." 412 U.S. at 113 (footnote omitted). Finally, it made clear that this rejection of any initial access right extended to Congress as well as to the Commission:

> "Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several

> occasions[12] and considered various proposals that would have vested private individuals with a right of access.[13]" *Id.* at 113-14.

Footnote 12 to that strongly worded statement first acknowledged congressional approval of the fairness doctrine in statutory form. It then considered Section 312(a)(7) and stated:

> "Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license 'for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.' Campaign Communications Reform Act of 1972, Pub.L. 92-225, 86 Stat. 4. This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U.S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315(a), in Political Broadcasts—Equal Time, Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90." 412 U.S. at 113-14 n.12.

Thus, this Court, in support of its conclusion that despite various amendments of the Communications Act Congress had never chosen to alter a policy that denied any individual the "right to command the use of broadcast facilities," specifically considered Section 312(a)(7) and concluded that its enactment was consistent with that view since it essentially codified existing FCC policy, which imposed no such requirement.*

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*If anything, that point is emphasized by way of contrast to the proposed legislation described in the Court's footnote 13. That legislation would have vested initial access rights in Senators and Congressmen, much as the Commission now interprets § 312 (a)(7) to grant such individual rights to candidates for federal

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The Court of Appeals dismissed this Court's interpretation of Section 312(a)(7) as "cursory" and characterized it as "*dictum* [which] strayed far from what was before the Court" (629 F.2d at 13; Pet. JA 21a).* We think it clear

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office. This Court, in support of its conclusion that no such right had ever been granted, noted that such proposals had been rejected.

* In addition to characterizing this Court's statement as dictum the Commission sought to avoid its impact by stating: "That question was not before the Court; and the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it" (74 F.C.C.2d at 662; Pet. JA 119a). In fact, however, the Commission (and the United States) had put forth in their brief in *CBS* v. *DNC* an interpretation of § 312(a)(7) which explicitly stated that the statute codified already existing obligations:

> "In exercising its discretion, the broadcaster would fail to carry out its obligations to the public if it did not make time available to candidates for political office on a reasonable basis, since the purpose of Section 315 'is to facilitate political debate over radio and television.' *Farmers Union* v. *WDAY*, 360 U.S. 525, 534; see F.C.C. Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time*, Hearings before Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90; see also *En Banc Program Policy Statement*, 25 Fed. Reg. 7291. Congress has now codified this duty to the limited extent of permitting the Commission to revoke licenses 'for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.' Section 103(a)(2)(A), P.L. 92-225, approved February 7, 1972. Congress also revised the language of Section 315, *supra*, by adding the following italicized words: 'no obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate.' Section 103(b)(2)(B). Except to the extent modified, Congress has adhered to the original policy adopted in 1927." Brief of United States of America and FCC at 42-43 n.37, *CBS* v. *DNC*, *supra*.

In supporting this proposition, the Commission relied in its brief upon two of the authorities later referred to by this Court in its footnote 12: the decision in *Farmers Union* and the Commission's Memorandum on the Second Sentence of Section 315(a). Thus, contrary to the statement of the Commission in this case, this Court had before it the Commission's considered view of § 312(a)(7) and the Court's opinion took full and careful account of the Commission's position—by adopting it.

from the discussion above that this Court's interpretation represented an essential element in the exposition of Congress' historical antipathy to compelled initial access; as such, we believe it represents a considered and accurate appraisal of the limited intent of Section 312(a)(7). But we need not rely upon even the explicit statement of this Court to support our view of Section 312(a)(7), for the legislative history of that section makes clear the intent to do no more than enact into statutory form the substantive requirements of existing Commission policy, while making explicit the availability of license revocation as a penalty for repeated or willful disregard of that statute whether or not the licensee had otherwise performed well under the other public interest criteria.

C. *The Legislative History of Section 312(a)(7) Explicitly Manifests the Congressional Intent to Codify Pre-Existing Requirements of Candidate Access*

The Court of Appeals recognized in a footnote to its opinion—but otherwise failed to take into account in its decision—that the only legislative history which specifically relates to Section 312(a)(7) indicates that it was intended to underscore then-current FCC practice. The court went on to conclude:

> "The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to 'emphasize' the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during pre-election periods. S.Rep. No. 96, *supra,* at 34, *reprinted in* U.S. Code Cong. & Admin. News at 1781-82. However, it must be said that there is no specific explanation of the statutory language or statement of its intended impact in the Senate Report." (629 F.2d at 12 n.32; Pet. JA 17 n.32).

The court is in error in its concluding sentence. A fuller quotation of the passage referred to by the Court of Appeals makes clear the congressional understanding that no new substantive right was being created. The Senate Commerce Committee, after adding the provision which was to become Section 312(a)(7) to the bill (S. 382) that it recommended be passed (which at that time still included a provision eliminating the equal time requirements of Section 315),* in fact commented twice on the provision. The Committee stated:

> "Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee

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* The language which was to become § 312(a)(7) was added as an amendment to S. 382 by the Senate Commerce Committee. S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787. A related provision had earlier been included in S. 956, introduced by Senator Scott, but that provision was not enacted. *See* p. 42 n.* *infra*. These bills were two of three companion bills dealing with federal campaign reform which Congress was considering simultaneously in 1971. All three bills included provisions repealing in whole or in part the equal time requirements of § 315; the predecessor of § 312(a)(7) originally appeared as a subpart of a statutory section which partially repealed those requirements. S. Rep. No. 96, *supra*, at 2-3. There was a general consensus among the members of the Senate Committee and those who testified before it that § 315 had resulted in candidates receiving "no time" rather than "equal time." *See, e.g., id.* at 25, 34, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1778, 1787; S. Rep. No. 229, 92d Cong., 1st Sess. 116-17 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1854-55; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 152 (1971) (remarks of Senator Pastore).

It may well be that § 312(a)(7) was originally meant to compensate for repeal of the equal time requirements by ensuring that broadcasters would not construe such repeal as a diminution of their public interest obligations. This certainly is the thrust of the explanatory statements concerning § 312(a)(7) quoted in the text. While the Senate passed a partial repeal of the equal time requirements, the House version of the bill did not include such a provision and the Conference Committee eliminated it. S. Conf. Rep. No. 580, 92d Cong., 1st Sess. 21 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1866-67.

> to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission *has recognized* this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787 (emphasis added).

And, in the passage from which the Court of Appeals quoted in part, the Committee made clear the congressional understanding that no increase in the broadcaster's obligation was intended:

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC *should continue* to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. *Certainly no diminution* in the extent of such programming should result from the enactment of this legislation.
>
> "In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S. 382 contains an express provision to this effect." S. Rep. No. 96, *supra,* at 28, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781-82 (emphasis added).*

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* That Congress did not intend any significant departure from existing FCC practice in enacting § 312(a)(7) is further confirmed

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Thus, the only evidence of legislative intent with respect to Section 312(a)(7) shows that the statute was meant to provide a new penalty* and to underscore the obligation of broadcasters to provide time to political candidates generally. There is *no* indication that Congress intended to create a new right of access, certainly not one which requires the Commission to thrust itself into decisions regarding the commencement of campaigns and which requires it to assess the broadcaster's "weighing" of each candidate's needs.**

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by the statement of a sponsor of a related provision in S. 956 (a companion bill to S. 382, the bill finally enacted):

> "[T]here is a firm declaration of congressional intent that broadcasters have certain obligations to the public and to political candidates during election campaigns. Most of this language is excerpted directly from existing Federal Communications Commission regulations and from Federal court decisions affecting the operations of broadcasters. *I am simply codifying this language,* thus making it clear, without specific congressional regulation, that Congress is dead serious in its belief that broadcasters must deliver the goods in the public interest. If past performance is any indicator, I am certain they will." *Federal Election Campaign Act of 1971: Hearings on S.382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration,* 92d Cong., 1st Sess. 117-18 (1971) (statement of Senator Scott; emphasis added).

The provision included in S. 956 also provided for implementation by FCC rule-making; this aspect of the proposal was not adopted. *See Federal Election Campaign Act of 1971: Hearings on S.1, S.382, S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 132-34 (1971).

* As noted earlier, the Commission's *Report and Statement of Policy Re: Commission En Banc Programing Inquiry,* 44 F.C.C. 2303 (1960), listed political broadcasts as only one of 14 major program elements to be considered in assessing license renewal or revocation. Obviously, § 312(a)(7) "emphasized" the importance of this type of programming, making willful or repeated failure to provide "use" time a separate and distinct basis for revocation without regard to the licensee's compliance with other aspects of the public interest standard.

** In support of its interpretation of § 312(a)(7) the Court of Appeals relied to some extent upon the fact that the statute applies

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Statutory approval of existing Commission policy, of course, is not unusual in this area. In 1959, for example, Congress codified the Commission's fairness doctrine in Section 315(a). *See Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908, 922 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969). Legislative codification of an administrative policy makes pertinent standards more accessible and also provides a vehicle for Congress to ensure the continuation of current agency practice otherwise subject to alteration with changes in the agency's membership. *Cf.* 1A Sutherland, *Statutory Construction* § 28.16 (4th ed. 1972). Here, in addition to serving these purposes, Section 312(a)(7) also provided a new—and powerful—sanction for noncompliance to go along with the already existing interpretation of the public interest standard.

The Commission and the court below largely ignored the legislative history of Section 312(a)(7) itself. Indeed, the Commission found that "[t]he legislative history of Section

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only to federal candidates. It reasoned that "[t]his is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine" (629 F.2d at 11-12; Pet. JA 16a; emphasis in original). This puts an extremely heavy burden on the statute's reference to federal candidates—one that the language simply cannot bear. Moreover, in point of fact there are other, more credible reasons for the limitation. Most obviously, the central focus of the Federal Election Campaign Act was on federal campaigns, as the title of the Act itself suggests. Furthermore, as noted above, the provision was originally introduced as a limited counterweight to repeal of the equal time provisions of § 315; the proposed repeal of that section, however, pertained only to federal candidates. *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 11-14, 53 (1971). More generally, the legislation of which § 312(a)(7) was but one part may have been considered least subject to constitutional challenge insofar as it related to federal candidates; it was thought that Congress should be wary of enacting legislation affecting the states' political campaigns. *See* S. Rep. No. 96, 92d Cong., 1st Sess. 32 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1785; S. Rep. No. 229, 92d Cong., 1st Sess. 99-103 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1839-42.

312(a)(7) does little to clarify" the Commission's "responsibilities and procedures" (74 F.C.C.2d at 637; Pet. JA 78a). The Commission and the court instead focused on one overall purpose of the Federal Election Campaign Act of 1971 of which Section 312(a)(7) was a part. That Act, both concluded, was intended to give greater rights of access to candidates for federal office.*

In fact, this analysis misreads the method by which such access was to be granted and wholly ignores two other crucial purposes of the overall legislation—both of which are significantly and unnecessarily frustrated by the refusal to give effect to Congress' expressed intent to codify existing obligations.

The "increased access" to which the Commission and court refer was to be accomplished through specifically

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* The court below also attributed significance to the fact that in enacting § 312(a)(7) Congress made a "conforming amendment" to the second sentence of § 315(a) which added the italicized phrase, "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate" (emphasis added). The Court of Appeals concluded: "If Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to Section 315 would have been required" (629 F.2d at 12; Pet. JA 18a).

The court's interpretation is simply erroneous. The second sentence of § 315(a) makes clear that no initial right of access is granted to any candidate by the "equal opportunities" provision of that section. The court below overlooked the fact that, as originally enacted, this sentence read: "No obligation is *hereby* imposed upon any licensee . . . ." Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170, *reenacted as* Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064 (emphasis added). The word "hereby," however, was omitted during codification as a "redundancy." *Obligation of Licensee to Carry Political Broadcasts*, 25 R.R. 1731, 1732 n.1 (1963). When Congress amended the sentence in 1971 by reinserting the functional equivalent of "hereby," it merely indicated that the general obligation to provide reasonable access to candidates—an obligation *not* imposed by § 315 but already inherent in the public interest standard—had been codified in a separate provision of the Act. In no way did Congress thereby comment upon the content of that obligation, much less suggest that it now conferred upon candidates "individual rights" to access.

identified provisions of the bill. None of these included the provision that was to become Section 312(a)(7). *See* S. Rep. No. 96, 92d Cong., 1st Sess. 20-21 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773-74; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 152 (1971). Thus, the Senate Report cited by the court below (629 F.2d at 12 n.32; Pet. JA 17a n.32) refers to increased access and then states: "To accomplish its purpose, Title I, as amended, would do the following . . . ." * Each of the provisions relied upon to achieve the "greater access" referred to by the Report is then listed. The repeal of the equal time provisions and the requirement that lowest unit advertising rates be made available to candidates, for example, are specifically enumerated. Conspicuous by its absence, however, is any reference to what was to become Section 312(a)(7). While increased access in some form may have been the goal of the proposed repeal of the equal time provisions, it was *not* a goal of Section 312(a)(7). That section was designed, as the legislative history clearly indicates—and as this Court has stated—to codify existing Commission practice.

It is clear that one significant purpose of the Federal Election Campaign Act of 1971 was to *reduce* campaign costs.** The legislation also included a provision which, the legislators hoped, would shorten media campaigns.*** But

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* S. Rep. No. 96, *supra,* at 21, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1774.

** *See* S. Rep. No. 96, *supra,* at 20-22, 31-33, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1774-75, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 151 (1971) (remarks of Senator Pastore).

*** This provision, now § 315(b)(1) of the Communications Act, established periods of 60 days before a general election and 45 days before a primary election during which a licensee would be pro-

(Footnote continued on following page)

neither of these goals was even addressed by the Court of Appeals in its opinion.* The decisions below have had the anomalous and impermissible effect of thwarting both of these legislative purposes at once, for the decisions ensure both lengthier and costlier campaigns.**

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hibited from selling broadcast time to candidates at more than its lowest unit rates. Senators Prouty, Cooper, and Scott noted that "[e]veryone agrees that political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." S. Rep. No. 229, 92d Cong., 1st Sess. 118 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1855. To the same effect, see *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 393 (1971) (remarks of Chairman Magnuson and Senator Hart); *id.* at 619 (remarks of Senator Pastore); S. Rep. No. 96, *supra,* at 28, 34, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781, 1787; 117 Cong. Rec. 30075 (1971) (remarks of Senator Dole).

* The court also ignored another overall concern of Congress—minimizing the advantages of incumbents. *See Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 525 (1971) (testimony of Attorney General Kleindienst noting that the purpose of § 315 was to reduce the incumbent's media advantage); *id.* at 348 (remarks of Senator Scott); 117 Cong. Rec. 28812 (1971) (remarks of Senator Prouty). In view of the congressional concern with the media advantage accorded incumbents, it is particularly baffling that the FCC expressly elected to exclude the media coverage of incumbents from its assessment of a candidate's "needs" (74 F.C.C.2d at 669-70; Pet. JA 130a-131a).

** The latest presidential campaign was longer and more expensive than any in history. Television advertising played a major role in both respects. The burden of that campaign on the electorate as well as on the candidates has been noted by one commentator:

> "The dead weight of the 1980 presidential campaign has fallen away, and Americans, no matter how they voted, seem to be walking with that little bounce in the spirit that comes when an ordeal is over, a decision finally made. The evening hour, for example, seems unaccountably more pleasant; the reason may be that political advertising has abruptly vanished from television—a sweet, almost subliminal improvement in

(Footnote continued on following page)

The Court of Appeals' decision, as well as the orders of the Commission, ignore other clear statements of Congress as to its intent in enacting the Federal Election Campaign Act of 1971. Thus, much of the Commission's analysis seems to proceed from the premise that federal candidates were the "intended beneficiaries" of the Act (74 F.C.C.2d at 642; Pet. JA 87a).* In fact, however, the legislation was directed toward improving the electoral process for the benefit of the country at large. According to the key spokesmen for the legislation, their goal was not to benefit any individual candidate, but the public and the electoral process.** This difference is not merely semantic or rhetorical but one with real consequences. It is the difference between an individual right of access granted only to federal candidates, which the Commission and the court below fashioned, and the previously recognized and generally enforced obligation of broadcasters to sell time to political candidates generally in the public interest. The view of the Commission, for example, that individual candidates are the "intended beneficiaries" of the legislation doubtless resulted in its use of the subjective criterion of

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the moral atmosphere. No more candidates hagiographically displayed, saints mixing radiantly with the adoring throng; no more of those sarcastic prosecutorial voice-overs about the other guy, the pitchman's tone as low and urgent and insinuating as a whisper of Cassius in the ear. No more that tussling, scuffling sound of the reluctant national psyche being dragged on a leash toward a booth with curtains and a lever in it." Morrow, "Stop the Endless Campaign, Please," *Time*, Dec. 1, 1980, at 54.

* The Commission has continued to place special emphasis on this interpretation in even more recent decisions. *See, e.g., Ed Clark for President Committee*, 48 R.R.2d 433, 437 (FCC Broadcast Bureau 1980).

** *See* S. Rep. No. 96, *supra*, at 20-21, 31-33, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773-74, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 151 (1971) (statement of Senator Pastore).

an individual candidate's "needs" as a determining factor. By making an "individual right" the focal point of its view of the statute, rather than looking to the public interest or the campaign as a whole, the Commission and the Court of Appeals rejected the even-handed approach followed by the Commission in the past, one which properly focused on whether the licensee was providing adequate amounts of time generally to political candidates.

The need for *ad hoc*, and ultimately subjective, assessments concerning candidates "needs," "rights of access," and the starting date of such an amorphous process as a "national campaign" would not have been required by the interpretation of the statute which the FCC itself had previously urged upon this Court in *CBS* v. *DNC* and which this Court had itself accepted.* Indeed, the inconsistency in the positions taken by the FCC since the enactment of Section 312(a)(7) goes far to undermine the acceptability of its interpretation of the statute in this case. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974).

The decisions below, based as they are on a misreading of the legislative history of Section 312(a)(7) in particular and of the Federal Election Campaign Act as a whole, could not stand even if that misinterpretation had no significant impact on our regulatory and political systems. But as discussed in Part I above, the consequences of that misreading have the most serious impact on the freedom of broadcast journalism and the integrity of the electoral process. The interpretation given the statute below cannot stand.

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* *See* p. 39 n.* *supra*.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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